ORAL ARGUMENT SCHEDULED ON MARCH 21, 2022

No. 20-1070

In the

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CITY OF SCOTTSDALE, Arizona
Petitioner
v.

FEDERAL AVIATION ADMINISTRATION, and STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration
Respondents

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY; FORT MCDOWELL YAVAPAI NATION; TOWN OF FOUNTAIN HILLS,
Amici Curiae for Petitioner.

ADDENDUM TO PETITIONER CITY OF SCOTTSDALE'S FINAL OPENING BRIEF
(Volume 1 pp. ADD001-ADD041)

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Respectfully submitted on February 24, 2022.

Dated: February 24, 2022 LEECH TISHMAN FUSCALDO & LAMPL, INC.

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5 USCS § 551

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 5. Administrative Procedure (Subchs. I — V) > Subchapter II. Administrative Procedure (§§ 551 — 559)

§ 551. Definitions

For the purpose of this subchapter [*5 USCS §§ 551* et seq.]—

(1)"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A)the Congress;

(B)the courts of the United States;

(C)the governments of the territories or possessions of the United States;

(D)the government of the District of Columbia;

or except as to the requirements of section 552 of this title [*5 USCS § 552*]—

(E)agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F)courts martial and military commissions;

(G)military authority exercised in the field in time of war or in occupied territory; or

(H)functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49 [*49 USCS §§ 47151* et seq.]; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2)"person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3)"party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4)"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5)"rule making" means agency process for formulating, amending, or repealing a rule;

(6)"order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7)"adjudication" means agency process for the formulation of an order;

(8)"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9)"licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10)"sanction" includes the whole or a part of an agency—

(A)prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B)withholding of relief;

(C)imposition of penalty or fine;

(D)destruction, taking, seizure, or withholding of property;

(E)assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F)requirement, revocation, or suspension of a license; or

(G)taking other compulsory or restrictive action;

(11)"relief" includes the whole or a part of an agency—

(A)grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B)recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C)taking of other action on the application or petition of, and beneficial to, a person;

(12)"agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13)"agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14)"ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter [*5 USCS §§ 551* etc.].

History

HISTORY:

Act Sept. 6, 1966, *P. L. 89-554*, § 1, *80 Stat. 381*; Sept. 13, 1976, *P. L. 94-409*, § 4(b), *90 Stat. 1247*; July 5, 1994, *P. L. 103-272*, § 5(a), *108 Stat. 1373*; Jan. 4, 2011, *P. L. 111-350*, § 5(a)(2), *124 Stat. 3841*.

End of Document

5 USCS § 706, Part 1 of 4

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [*5 USCS §§ 556* and *557*] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History

HISTORY:

Act Sept. 6, 1966, *P. L. 89-554*, § 1, *80 Stat. 393*.

End of Document

42 USCS § 4332, Part 1 of 2

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY (§§ 4321 — 4370m-12) > POLICIES AND GOALS (§§ 4331 — 4335)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [*42 USCS §§ 4321* et seq.], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [*42 USCS §§ 4341* et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by *section 552 of title 5, United States Code*, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii)the responsible Federal official furnishes guidance and participates in such preparation,

(iii)the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv)after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [*42 USCS §§ 4321* et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [;]

(E)study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F)recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G)make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H)initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I)assist the Council on Environmental Quality established by title II of this Act [*42 USCS §§ 4341* et seq.].

History

HISTORY:

Act Jan. 1, 1970, *P. L. 91-190*, Title I, § 102, *83 Stat. 853*; Aug. 9, 1975, *P. L. 94-83*, *89 Stat. 424*.

End of Document

49 USCS § 303

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle I. Department of Transportation (Chs. 1 — 7) > CHAPTER 3. General Duties and Power (Subchs. I — III) > Subchapter I. Duties of The Secretary of Transportation (§§ 301 — 312)

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of programs and projects. Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1)there is no prudent and feasible alternative to using that land; and

(2)the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De minimis impacts.

(1) Requirements.

(A) Requirements for historic sites. The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges. The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria. In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites. With respect to historic sites, the Secretary may make a finding of de minimis impact only if—

(A)the Secretary has determined, in accordance with the consultation process required under *section 306108 of title 54, United States Code*, that—

(i)the transportation program or project will have no adverse effect on the historic site; or

(ii)there will be no historic properties affected by the transportation program or project;

(B)the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C)the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges. With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A)the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B)the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(e) Satisfaction of requirements for certain historic sites.

(1) In general. The Secretary shall—

(A)align, to the maximum extent practicable, the requirements of this section with the requirements of the National Environmental Policy Act of 1969 (*42 U.S.C. 4321* et seq.) and section 306108 of title 54 [*54 USCS § 306108*], including implementing regulations; and

(B)not later than 90 days after the date of enactment of this subsection [enacted Dec. 4, 2015], coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this subsection as the "Council") to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) Avoidance alternative analysis.

(A) In general. If, in an analysis required under the National Environmental Policy Act of 1969 (*42 U.S.C. 4321* et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may—

(i)include the determination of the Secretary in the analysis required under that Act [*42 USCS §§ 4321* et seq.];

(ii)provide a notice of the determination to—

(I)each applicable State historic preservation officer and tribal historic preservation officer;

(II)the Council, if the Council is participating in the consultation process under section 306108 of title 54 [*54 USCS § 306108*]; and

(III)the Secretary of the Interior; and

(iii)request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (c)(1).

(B) Concurrence. If the applicable preservation officer, the Council, and the Secretary of the Interior each provide a concurrence requested under subparagraph (A)(iii), no further analysis under subsection (c)(1) shall be required.

(C) Publication. A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall—

(i)be included in the record of decision or finding of no significant impact of the Secretary; and

(ii)be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) Aligning historical reviews.

(A) In general. If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (c)(2) through the consultation requirements of section 306108 of title 54 [*54 USCS § 306108*].

(B) Satisfaction of conditions. To satisfy subsection (c)(2), the applicable preservation officer, the Council, and the Secretary of the Interior shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54 [*54 USCS § 306108*].

(f) References to past transportation environmental authorities.

(1) Section 4(f) requirements. The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (*Public Law 89-670*; *80 Stat. 934*) as in effect before the repeal of that section).

(2) Section 106 requirements. The requirements of section 306108 of title 54 [*54 USCS § 306108*] are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (*Public Law 89-665*; *80 Stat. 917*) as in effect before the repeal of that section).

(g) Bridge exemption from consideration. A common post-1945 concrete or steel bridge or culvert (as described in *77 Fed. Reg. 68790*) that is exempt from individual review under section 306108 of title 54 [*54 USCS § 306108*] shall be exempt from consideration under this section.

(h) Rail and transit.

(1) In general. Improvements to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines or elements thereof that are in use or were historically used for the transportation of goods or passengers shall not be considered a use of a historic site under subsection (c), regardless of whether the railroad or rail transit line or element thereof is listed on, or eligible for listing on, the National Register of Historic Places.

(2) Exceptions.

(A) In general. Paragraph (1) shall not apply to—

(i)stations; or

(ii)bridges or tunnels located on—

(I)railroad lines that have been abandoned; or

(II)transit lines that are not in use.

(B) Clarification with respect to certain bridges and tunnels. The bridges and tunnels referred to in subparagraph (A)(ii) do not include bridges or tunnels located on railroad or transit lines—

(i)over which service has been discontinued; or

(ii)that have been railbanked or otherwise reserved for the transportation of goods or passengers.

History

HISTORY:

Act Jan. 12, 1983, P. L. 97-449, § 1(b), 96 Stat. 2419; April 2, 1987, P. L. 100-17, Title I, § 133(d), 101 Stat. 173; Aug. 10, 2005, *P. L. 109-59*, Title VI, § 6009(a)(2), *119 Stat. 1875*; Dec. 19, 2014, *P. L. 113-287*, § 5(p), *128 Stat. 3272*; Dec. 4, 2015, *P. L. 114-94*, Div A, Title I, Subtitle C, §§ 1301(b), 1302(b), 1303(b), Title XI, Subtitle E, § 11502(b), *129 Stat. 1376*, 1377, 1378, 1690.

End of Document

49 USCS § 46110

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle VII. Aviation Programs (Pts. A — E) > Part A. Air Commerce and Safety (Subpts. I — IV) > Subpart IV. Enforcement and Penalties (Chs. 461 — 465) > CHAPTER 461. Investigations and Proceedings (§§ 46101 — 46111)

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title [*49 USCS § 41307* or *41509(f)*], a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part [*49 USCS §§ 40101* et seq.], part B [*49 USCS §§ 47101* et seq.], or subsection (l) or (s) of section 114 [*49 USCS § 114*] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate. The Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28 [*28 USCS § 2112*].

(c) Authority of court. When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

History

HISTORY:

Act July 5, 1994, *P. L. 103-272*, § 1(e), *108 Stat. 1230*; Nov. 19, 2001, *P. L. 107-71*, Title I, § 140(b)(1), (2), *115 Stat. 641*; Dec. 12, 2003, *P. L. 108-176*, Title II, Subtitle B, § 228, *117 Stat. 2532*; Oct. 5, 2018, *P.L. 115-254*, Div K, Title I, Subtitle I, § 1991(f)(1)-(4), *132 Stat. 3642*.

End of Document

54 USCS § 300101

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 54. NATIONAL PARK SERVICE AND RELATED PROGRAMS (§§ 100101 — 320303) > Subtitle III. National Preservation Programs (§§ 300101 — 320303) > Division A. Historic Preservation (Subpts. 1 — 6) > Subdivision 1. General Provisions (Chs. 3001 — 3003) > CHAPTER 3001. Policy (§ 300101)

§ 300101. Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to—

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

History

HISTORY:

Act Dec. 19, 2014, *P. L. 113-287*, § 3, *128 Stat. 3187*.

End of Document

54 USCS § 306108

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 54. NATIONAL PARK SERVICE AND RELATED PROGRAMS (§§ 100101 — 320303) > Subtitle III. National Preservation Programs (§§ 300101 — 320303) > Division A. Historic Preservation (Subpts. 1 — 6) > Subdivision 5. Federal Agency Historic Preservation Responsibilities (Ch. 3061) > CHAPTER 3061. Program Responsibilities and Authorities (Subchs. I — III) > Subchapter I. In General (§§ 306101 — 306114)

§ 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

History

HISTORY:

Act Dec. 19, 2014, *P. L. 113-287*, § 3, *128 Stat. 3227*.

End of Document

36 CFR 800.1

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart A — Purposes and Participants

§ 800.1 Purposes.

(a) Purposes of the section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) Relation to other provisions of the act. Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) Timing. The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27071, May 18, 1999; *65 FR 77698*, 77725, Dec. 12, 2000]

36 CFR 800.2

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart A — Purposes and Participants

§ 800.2 Participants in Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) Council entry into the section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) Council assistance. Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) State historic preservation officer.

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify

Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants t of apiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) Nature of involvement. The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) Use of agency procedures. The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27071, May 18, 1999; *65 FR 77698*, 77726, Dec. 12, 2000]

End of Document

36 CFR 800.3

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart B — The Section 106 Process

§ 800.3 Initiation of the section 106 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) Failure of the SHPO/THPO to respond. If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next

step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27073, May 18, 1999; *65 FR 77698*, 77728, Dec. 12, 2000]

End of Document

36 CFR 800.4

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Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart B — The Section 106 Process

§ 800.4 Identification of historic properties.

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) Phased identification and evaluation. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background

research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) Evaluate historic significance.

(1) Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) Determine whether a property is eligible. If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) Results of identification and evaluation.

(1) No historic properties affected. If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)

(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council

determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) Historic properties affected. If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27074, May 18, 1999; *65 FR 77698*, 77728, Dec. 12, 2000; *69 FR 40544*, 40553, July 6, 2004]

End of Document

36 CFR 800.5

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Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart B — The Section 106 Process

§ 800.5 Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding.

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) Council review of findings.

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)

(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision

and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27075, May 18, 1999; *65 FR 77698*, 77729, Dec. 12, 2000; *69 FR 40544*, 40553, July 6, 2004]

End of Document

40 CFR 1501.2

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Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1501 — Nepa and Agency Planning

Notice

. This section has more than one version with varying effective dates.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Authority Note Applicable to Title 40, Ch. V, Pt. 1501

History

43 FR 55992, Nov. 29, 1978; *85 FR 43304*, 43359, July 16, 2020]

End of Document

40 CFR 1501.3

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1501 — Nepa and Agency Planning

Notice

. This section has more than one version with varying effective dates.

§ 1501.3 Determine the appropriate level of NEPA review. [See Publisher's Note for the effective date.]

[PUBLISHER'S NOTE: *85 FR 43304*, 43359, July 16, 2020, which revised Part 1501, provides: "This is a major rule subject to congressional review. The effective date is September 14, 2020. However, if congressional review has changed the effective date, CEQ will publish a document in the Federal Register to establish the actual effective date or to terminate the rule."]

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this chapter).

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

(1) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

(i) Both short- and long-term effects.

(ii) Both beneficial and adverse effects.

(iii) Effects on public health and safety.

(iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Authority Note Applicable to Title 40, Ch. V, Pt. 1501

History

43 FR 55992, Nov. 29, 1978; *85 FR 43304*, 43359, July 16, 2020]

End of Document

40 CFR 1501.4

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1501 — Nepa and Agency Planning

Notice

. This section has more than one version with varying effective dates.

§ 1501.4 Categorical exclusions. [See Publisher's Note for the effective date.]

[PUBLISHER'S NOTE: *85 FR 43304*, 43359, July 16, 2020, which revised Part 1501, provides: "This is a major rule subject to congressional review. The effective date is September 14, 2020. However, if congressional review has changed the effective date, CEQ will publish a document in the Federal Register to establish the actual effective date or to terminate the rule."]

(a) For efficiency, agencies shall identify in their agency NEPA procedures (§ 1507.3(e)(2)(ii) of this chapter) categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.

(b) If an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.

(2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Authority Note Applicable to Title 40, Ch. V, Pt. 1501

History

43 FR 55992, Nov. 29, 1978; *85 FR 43304*, 43359, July 16, 2020]

40 CFR 1508.4

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1508 — Terminology and Index

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

Chapter 3: Levels of National Environmental Policy Act Review

3-1. Three Levels of National Environmental Policy Act Review. Once the FAA determines that NEPA applies to a proposed action, it needs to decide on the appropriate level of review. The three levels of NEPA review are Categorical Exclusion (CATEX), Environmental Assessment (EA), and Environmental Impact Statement (EIS). Each of the three levels of review is briefly described in the following paragraphs.

3-1.1. Categorically Excluded Actions. A CATEX refers to a category of actions that do not individually or cumulatively have a significant effect on the human environment, and for which, neither an EA nor an EIS is required. A CATEX is not an exemption or waiver of NEPA review; it is a level of NEPA review. If a proposed action falls within the scope of a CATEX (see Paragraph 5-6, The Federal Aviation Administration's Categorical Exclusions), and there are no extraordinary circumstances (see Paragraph 5-2, Extraordinary Circumstances), an EA or EIS is not required. The FAA may, at its discretion, decide to prepare an EA in order to assist agency planning and decision-making even if a proposed action fits within a CATEX and extraordinary circumstances do not exist, except for actions subject to categorical exclusion under Section 213 of the FAA Modernization and Reform Act (see Paragraphs 5-6.5.q and 5-6.5.r).

3-1.2. Actions Normally Requiring an Environmental Assessment. The purpose of an EA is to determine whether a proposed action has the potential to significantly affect the human environment (see Paragraph 4-3 for more information on determining significance). An EA is a concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. An EA may facilitate the preparation of an EIS, when one is necessary.

a. Environmental Assessments. An EA, at a minimum, must be prepared when the proposed action does not normally require an EIS (see Paragraph 3-1.3, Actions Normally Requiring an Environmental Impact Statement) and:

(1) does not fall within the scope of a CATEX (see Paragraph 5-6, The Federal Aviation Administration's Categorical Exclusions); or

(2) falls within the scope of a CATEX, but there are one or more extraordinary circumstances (see Paragraph 5-2, Extraordinary Circumstances).

b. Examples. The following FAA actions normally require an EA:

(1) Acquisition of land greater than three acres for, and the construction of, new office buildings and essentially similar FAA facilities.

(2) Issuance of certificates for new, amended, or supplemental aircraft types for which (a) environmental regulations have not been issued; or (b) new, amended, or supplemental engine types for which emission regulations have not been issued; or (c) where a NEPA analysis has not been prepared in connection with a regulatory action.

(3) Establishment of aircraft/avionics maintenance bases to be operated by the FAA.

(4) Authorization to exceed Mach 1 flight under 14 CFR § 91.817, *Civil Aircraft Sonic Boom*.

(5) Establishment of FAA housing, sanitation systems, fuel storage and distribution systems, and power source and distribution systems.

(6) Establishment or relocation of facilities such as Air Route Traffic Control Centers (ARTCC), Airport Traffic Control Towers (ATCT), and off-airport Air Route Surveillance Radars (ARSR), Air Traffic Control Beacons (ATCB), and Next Generation Radar (NEXRAD).

(7) Establishment, relocation, or construction of facilities used for communications (except as provided under Paragraph 5-6.3a) and navigation that are not on airport property.

(8) Establishment or relocation of instrument landing systems (ILS).

(9) Establishment or relocation of approach lighting systems (ALS) that are not on airport property.

(10) Unconditional Airport Layout Plan (ALP) approval of, or Federal financial participation in, the following categories of airport actions:

(a) Location of a new airport that would serve only general aviation;

(b) Location of a new commercial service airport that would not be located in a Metropolitan Statistical Area (MSA);

(c) A new runway at an existing airport that is not located in an MSA;

(d) Runway strengthening having the potential to significantly increase off-airport noise impacts (see Exhibit 4-1);

(e) Construction or relocation of entrance or service road connections to public roads that substantially reduce the level of service rating of such public roads below the acceptable level determined by the appropriate transportation agency (i.e., a highway agency); and

(f) Land acquisition associated with any of the items in (10)(a)–(f).

(11) Approval of operations specifications or amendments that may significantly change the character of the operational environment of an airport, including, but not limited to:

(a) Approval of operations specifications authorizing an operator to use aircraft to provide scheduled passenger or cargo service at an airport that may cause significant impacts to noise, air quality, or other environmental impact categories (see Exhibit 4-1); or

(b) Amendment of operations specifications authorizing an operator to serve an airport with different aircraft that may cause significant impacts to noise, air quality, or other environmental impact categories (see Exhibit 4-1).

(12) New air traffic control procedures (e.g., instrument approach procedures, departure procedures, en route procedures) and modifications to currently approved procedures that routinely route aircraft over noise sensitive areas at less than 3,000 feet above ground level (AGL) (unless otherwise categorically excluded under Paragraphs (procedures category) 5-6.5q and 5-6.5r).

(13) Establishment or modification of an Instrument Flight Rules Military Training Route (IR MTR).

(14) Special Use Airspace (SUA) (unless otherwise explicitly listed as an advisory action (see Paragraph 2-1.2.b, Advisory Actions) or categorically excluded (see Paragraph 5-6, The Federal Aviation Administration's Categorical Exclusions)).

(15) Issuance of any of the following:

(a) A commercial space launch site operator license for operation of a launch site at an existing facility on developed land where little to no infrastructure would be constructed (e.g., co-located with a Federal range or municipal airport); or

(b) A commercial space launch license, reentry license, or experimental permit to operate a vehicle to/from an existing site.

(16) Formal and informal runway use programs that may significantly increase noise over noise sensitive areas (see Exhibit 4-1).

3-1.3. Actions Normally Requiring an Environmental Impact Statement.

a. Environmental Impact Statements. Under NEPA, the FAA must prepare an EIS for actions significantly affecting the quality of the human environment (see Chapter 4 for additional information regarding significance of impacts). An EIS is a detailed written statement required under Section 102(2)(C) of NEPA when one or more environmental impacts would be significant and mitigation measures cannot reduce the impact(s) below significant levels. Direct, indirect, and cumulative impacts must be considered when determining significance (see Paragraphs 4-2.d and 4-3).

b. Examples. The following are actions that normally require an EIS:

(1) Unconditional ALP approval, or Federal financial participation in, the following categories of airport actions:

(a) Location of a new commercial service airport in an MSA;

(b) A new runway to accommodate air carrier aircraft at a commercial service airport in an MSA; and

(c) Major runway extension.

(2) Issuance of a commercial space launch site operator license, launch license, or experimental permit to support activities requiring the construction of a new commercial space launch site on undeveloped land.

3-2. Programmatic National Environmental Policy Act Documents and Tiering. A programmatic review should assist decisionmakers and the public in understanding the environmental impact from proposed large scope federal actions and activities. A programmatic EIS or EA may be prepared to cover (1) a broad group of related actions; or (2) a program, policy, plan, system, or national level proposal that may later lead to individual actions, requiring subsequent NEPA analysis. A programmatic document is useful in analyzing the cumulative impacts of a group of related actions and when the proposed actions are adequately analyzed can serve as the NEPA review for those actions. Programmatic documents may also be useful in

factors necessary to understand and convey the extent of the impacts on the resource. Maps, plans, photos, or drawings may assist in describing the property and understanding the potential use, whether physical taking or constructive use. Any statements regarding the property's significance by officials having jurisdiction should be documented and attached.

5.3.1. Physical Use of Section 4(f) Property

A Section 4(f) use would occur if the proposed action or alternative(s) would involve an actual physical taking of Section 4(f) property through purchase of land or a permanent easement, physical occupation of a portion or all of the property, or alteration of structures or facilities on the property.

A temporary occupancy of a Section 4(f) property for project construction-related activities is usually so minimal that it does not constitute a use within the meaning of Section 4(f). However, a temporary occupancy would be considered a use if:

- The duration of the occupancy of the Section 4(f) property is greater than the time needed to build a project and there is a change in ownership of the land,
- The nature and magnitude of changes to the 4(f) property are more than minimal,
- Anticipated permanent adverse physical impacts would occur and a temporary or permanent interference with Section 4(f) activities or purposes would occur,
- The land use is not fully returned to existing condition, or
- There is no documented agreement with appropriate agencies having jurisdiction over the Section 4(f) property.

If a project would physically occupy an NRHP-listed or eligible property containing archeological resources that warrant preservation in place, there would be a Section 4(f) use. Although there may be some physical taking of land, Section 4(f) does not apply to NRHP-listed or eligible archeological properties where the responsible FAA official, after consultation with the SHPO/THPO, determines that the archeological resource is important chiefly for data recovery and is not important for preservation in place.

5.3.2. Constructive Use of Section 4(f) Property

Use, within the meaning of Section 4(f), includes not only the physical taking of such property, but also "constructive use." The concept of constructive use is that a project that does not physically use land in a park, for example, may still, by means of noise, air pollution, water pollution, or other impacts, dissipate its aesthetic value, harm its wildlife, restrict its access, and take it in every practical sense. Constructive use occurs when the impacts of a project on a Section 4(f) property are so severe that the activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the Section 4(f) property that contribute to its significance or enjoyment are substantially diminished. This means that the value of the Section 4(f) property, in terms of its prior significance and enjoyment, is substantially reduced or lost. For example, noise would need to be at levels high enough to have negative consequences of a substantial nature that amount to a taking of a park or portion of a park for transportation purposes.

The responsible FAA official must consult all appropriate Federal, state, and local officials having jurisdiction over the affected Section 4(f) properties when determining whether project-related impacts would substantially impair the resources. Following consultation and assessment of potential impacts, the FAA is solely responsible for Section 4(f) applicability and determinations.

The land use compatibility guidelines in 14 CFR part 150 (the part 150 guidelines) may be relied upon by the FAA to determine whether there is a constructive use under Section 4(f) where the land uses specified in the part 150 guidelines are relevant to the value, significance, and enjoyment of the Section 4(f) lands in question. The FAA may rely on the part 150 guidelines in evaluating constructive use of lands devoted to traditional recreational activities. The FAA may primarily rely upon the day night average sound levels (DNL) in part 150 rather than single event noise analysis because DNL: (1) is the best measure of significant impact on the quality of the human environment, (2) is the only noise metric with a substantial body of scientific data on the reaction of people to noise, and (3) has been systematically related to Federal compatible land use guidelines.

The FAA may also rely upon the part 150 guidelines to evaluate impacts on historic properties that are in use as residences. The part 150 guidelines may be insufficient to determine the noise impact on historic properties where a quiet setting is a generally recognized purpose and attribute, such as a historic village preserved specifically to convey the atmosphere of rural life in an earlier era or a traditional cultural property. If architecture is the relevant characteristic of a historic neighborhood, then project-related noise would not substantially impair the characteristics that led to eligibility for or listing on the NRHP. As a result, noise would not constitute a constructive use, and Section 4(f) would not be triggered. A historic property would not be considered to be constructively used for Section 4(f) purposes when the FAA issues a finding of no historic properties affected or no adverse effect under Section 106 of the NHPA, 54 U.S.C. § 300101 et seq.. Findings of adverse effects do not automatically trigger Section 4(f) unless the effects would substantially impair the affected resource's historical integrity. The FAA is responsible for complying with Section 106 of the NHPA regardless of the disposition of Section 4(f).

When assessing use of Section 4(f) properties located in a quiet setting and where the setting is a generally recognized feature or attribute of the site's significance, the FAA carefully evaluates reliance on the part 150 guidelines. The FAA must weigh additional factors in determining whether to apply the thresholds listed in the part 150 guidelines to determine the significance of noise impacts on noise sensitive areas within Section 4(f) properties (including, but not limited to, noise sensitive areas within national parks, national wildlife and waterfowl refuges, and historic sites including traditional cultural properties). The FAA may use the part 150 land use compatibility table as a guideline to determine the significance of noise impacts on Section 4(f) properties to the extent that the land uses specified bear relevance to the value, significance, and enjoyment of the lands in question. However, the part 150 guidelines may not be sufficient for all historic sites as described above, and the part 150 guidelines do not adequately address the impacts of noise on the expectations and purposes of people visiting areas within a national park or national wildlife refuge where other noise is very low and a quiet setting is a generally recognized purpose and attribute.

e. Record of Decision. The preparation of a ROD for a CATEX determination is not required and is uncommon. There may be instances where it would be advantageous for the FAA to prepare a separate formal decision document (i.e., a "CATEX/ROD") in connection with a CATEX determination. A CATEX/ROD might be advisable, for example, where there is substantial controversy regarding the applicability of a CATEX and/or the existence of extraordinary circumstances. When there is doubt whether a CATEX/ROD is appropriate, the responsible FAA official should consult with AGC-600 or Regional Counsel.

5-4. Public Notification. There is no requirement to notify the public when a CATEX is used. However, CEQ encourages agencies to determine circumstances in which the public should be engaged or notified before a CATEX is used. The FAA, as a regulatory agency, normally notifies the public when a CATEX is applied to a proposed rulemaking action. Other appropriate circumstances may be determined on a case-by-case basis.

5-5. Other Environmental Requirements. In addition to NEPA, a proposed action may be subject to special purpose laws and requirements that must be complied with before the action can be approved. The responsible FAA official must ensure, to the fullest extent possible, that the proposed action is in compliance with such requirements in addition to making the appropriate determination regarding use of a CATEX. To the extent that these other requirements are relevant to a determination of extraordinary circumstances, they must be addressed before a CATEX is used. The responsible FAA official must document compliance with applicable requirements, including any required consultations, findings, or determinations. The documentation of compliance with special purpose laws and requirements may either be included in a documented CATEX or may be documented separately from a CATEX. Special purpose laws and requirements may also have public notification requirements. Information on other environmental requirements that may apply to proposed actions is provided in the 1050.1F Desk Reference.

5-6. The Federal Aviation Administration's Categorical Exclusions. The FAA has determined that the actions listed in this paragraph normally do not individually or cumulatively have a significant effect on the human environment.

The CATEXs are organized by the following functions:

- Administrative/General: Actions that are administrative or general in nature;
- Certification: Actions concerning issuance of certificates or compliance with certification programs;
- Equipment and Instrumentation: Actions involving installation, repair, or upgrade of equipment or instruments necessary for operations and safety;
- Facility Siting, Construction, and Maintenance: Actions involving acquisition, repair, replacement, maintenance, or upgrading of grounds, infrastructure, buildings, structures, or facilities that generally are minor in nature;
- Procedural: Actions involving establishment, modification, or application of airspace and air traffic procedures; and
- Regulatory: Actions involving establishment of, compliance with, or exemptions to, regulatory programs or requirements.

t. Actions related to the retirement of the principal of bond or other indebtedness for terminal development. (ARP)*

u. Approval under 14 CFR part 161, *Notice and Approval of Airport Noise and Access Restrictions*, of a restriction on the operations of Stage 3 aircraft that does not have the potential to significantly increase noise at the airport submitting the restriction proposal or at other airports to which restricted aircraft may divert. (ARP)

5-6.2. Categorical Exclusions for Certification Actions. This category includes the list of CATEXs for FAA actions concerning issuance of certificates or compliance with certification programs. *An action included within this list of categorically excluded actions is not automatically exempted from environmental review under NEPA. The responsible FAA official must also review Paragraph 5-2, Extraordinary Circumstances, before deciding to categorically exclude a proposed action.*

a. Approvals and findings pursuant to 14 CFR part 36, *Noise Standards: Aircraft Type and Airworthiness Certification*, and acoustical change provisions under 14 CFR § 21.93. (ATO, AVS, APL)

b. Approvals of repairs, parts, and alterations of aircraft, commercial space launch vehicles, and engines not affecting noise, emissions, or wastes. (All)

c. Issuance of certificates such as the following: (1) new, amended, or supplemental aircraft types that meet environmental regulations; (2) new, amended, or supplemental engine types that meet emission regulations; (3) new, amended, or supplemental engine types that have been excluded by the EPA (see 14 CFR § 34.7, *Exemptions*); (4) medical, airmen, export, manned free balloon type, glider type, propeller type, supplemental type certificates not affecting noise, emission, or waste; (5) mechanic schools, agricultural aircraft operations, repair stations, and other air agency ratings; and (6) operating certificates. (ATO, AVS)

d. Operating specifications and amendments that do not significantly change the operating environment of the airport. "That do not significantly change the operating environment of the airport" refers to minor operational changes at an airport that do not have the potential to cause significant impacts to noise, air quality, or other environmental impact categories. These would include, but are not limited to, authorizing use of an alternate airport, administrative revisions to operations specifications, or use of an airport on a one-time basis. The use of an airport on a one-time basis means the operator will not have scheduled operations at the airport, or will not use the aircraft for which the operator requests an amended operations specification, on a scheduled basis. (ATO, AVS)

e. Issuance of certificates and related actions under the Airport Certification Program (see 14 CFR part 139). (ARP)

f. Issuance of Airworthiness Directives (ADs) to ensure aircraft safety. (ATO, AVS)*

* See Paragraph 5-3.a.

Chapter 11: Administrative Information

11-1. Distribution. Notice of promulgation and availability of this Order is distributed to the FAA Assistant or Associate Administrators and their office and service directors, the Chief Operating Officer and vice-presidents of ATO, and the Chairs of the Environmental Network. This Order should be forwarded to all division and facility managers and NEPA practitioners.

A member of the public may obtain an electronic copy of this Order using the Internet by:

a. Visiting the FAA's Regulations and Policies website at http://www.faa.gov/regulations_policies/;

b. Searching the Federal eRulemaking Portal at http://www.regulations.gov; or

c. Accessing the Government Printing Office's website at http://www.gpo.gov/fdsys/.

A member of the public who does not have access to the Internet or is not able to use an electronic version may obtain a CD or hard copy of this Order, for a fee, by sending a request to the FAA, Office of Rulemaking (ARM-1), 800 Independence Avenue S.W., Washington, DC 20591, or by calling (202) 267-9680. Requestors should identify the docket number, notice number, or change number of this Order.

A member of the public may also access all documents the FAA considered in developing this Order through the Internet via the Federal eRulemaking Portal referenced in Paragraph 11-1.b.

11-2. Authority to Change This Order.

a. FAA Administrator. The Administrator reserves the authority to establish or change policy, delegate authority, or assign responsibility.

b. Executive Director of the Office of Environment and Energy (AEE-1). AEE-1 has the authority to add new chapters or appendices or change existing chapters or appendices after appropriate coordination with internal stakeholder organizations. AEE-1 also has the authority to update and amend the 1050.1F Desk Reference.

c. Organizational Elements. Changes proposed by an organizational element within the FAA must be submitted to AEE-1, who will evaluate, or assign a designee to evaluate the changes for incorporation. The LOB/SO must provide AEE with a memorandum describing the proposed change, a detailed justification for the change, and comments from other program offices if the proposed changes or revisions affect them.

11-3. Process for Changing This Order. AEE must, in addition to the formal clearance procedures prescribed in FAA Order 1320.1, *FAA Directives Management*, formally coordinate with AGC, the Office of the Assistant Secretary for Transportation Policy (P-1), and the Office of the General Counsel (C-1), consult with CEQ, and then publish the proposed changes or revisions to this Order in the *Federal Register* for public comment. After receiving all required FAA and DOT concurrences and after a finding of conformity is made by CEQ in accordance with 40 CFR § 1507.3(a), CEQ Regulations, the FAA may publish the final change or revision in the *Federal Register* and implement the revised Order.

property for a park or recreational purpose is temporary. A use that extends over a period of years may be sufficiently long that it would no longer be considered to be interim or temporary, if challenged.

Where the use of a property is changed by a state or local agency from a Section 4(f) type use to a transportation use in anticipation of a request for FAA approval, Section 4(f) will be considered to apply, even though the change in use may have taken place prior to the request for approval or prior to any FAA action on the matter. This is especially true where the change in use appears to have been undertaken in an effort to avoid the application of Section 4(f).

B-2.2. Environmental Consequences.

An initial assessment should be made to determine whether the proposed action and alternative(s) would result in the use of any of the properties to which Section 4(f) applies. If physical use or constructive use of a Section 4(f) property is involved, as further described in B-2.2.1 and B-2.2.2 below, the potential impacts of the proposed action and alternative(s) on the Section 4(f) property must be described in detail. The description of the affected Section 4(f) property should include the location, size, activities, patronage, access, unique or irreplaceable qualities, relationship to similarly used lands in the vicinity, jurisdictional entity, and other factors necessary to understand and convey the extent of the impacts on the resource. Maps, plans, photos, or drawings may assist in describing the property and understanding the potential use, whether physical taking or constructive use. Any statements regarding the property's significance by officials having jurisdiction should be documented and attached.

B-2.2.1. Physical Use of Section 4(f) Property.

A Section 4(f) use would occur if the proposed action or alternative(s) would involve an actual physical taking of Section 4(f) property through purchase of land or a permanent easement, physical occupation of a portion or all of the property, or alteration of structures or facilities on the property.

A temporary occupancy of a Section 4(f) property for project construction-related activities is usually so minimal that it does not constitute a use within the meaning of Section 4(f). However, a temporary occupancy would be considered a use if:

- The duration of the occupancy of the Section 4(f) property is greater than the time needed to build a project and there is a change in ownership of the land;
- The nature and magnitude of changes to the 4(f) property are more than minimal;
- Anticipated permanent adverse physical impacts would occur and a temporary or permanent interference with Section 4(f) activities or purposes would occur;
- The land use is not fully returned to existing condition; or
- There is no documented agreement with appropriate agencies having jurisdiction over the Section 4(f) property.

If a project would physically occupy an NRHP-listed or eligible property containing archeological resources that warrant preservation in place, there would be a Section 4(f) use. However, although there may be some physical taking of land, Section 4(f) does not apply to NRHP-listed or eligible archeological properties where the responsible FAA official, after consultation with the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on February 24, 2022. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: February 24, 2022 LEECH TISHMAN FUSCALDO & LAMPL

By: Steven M. Taber

Steven M. Taber
Attorneys for City of Scottsdale, Arizona

ORAL ARGUMENT SCHEDULED ON MARCH 21, 2022

No. 20-1070

In the

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CITY OF SCOTTSDALE, Arizona
Petitioner
v.

FEDERAL AVIATION ADMINISTRATION, and STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration
Respondents

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY; FORT MCDOWELL YAVAPAI NATION; TOWN OF FOUNTAIN HILLS,
Amici Curiae for Petitioner.

ADDENDUM OF STANDING DECLARATIONS IN SUPPORT OF PETITIONERS'/APPELLANTS' FINAL OPENING BRIEF

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ADDENDUM OF STANDING DECLARATION

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DECLARATION OF SHERRY SCOTT

I, Sherry Scott, hereby declare as follows:

1. I am an attorney licensed to practice in the State of Arizona. I have knowledge of, and am competent to testify regarding, all of the matters set forth herein.

2. I am the City Attorney for the City of Scottsdale, Arizona and I have worked for the City in a legal capacity for over 20 years.

3. The City of Scottsdale ("Scottsdale" or "the City") is a Council-Manager form of municipal government that was incorporated in June, 1951. The City of Scottsdale adopted its first City Charter in November, 1961, which was ratified by the voters and later approved by Arizona Governor Paul Fannin on November 16, 1961.

4. The Arizona Constitution in Article XIII grants cities such as the City of Scottsdale with the ability to adopt a city charter to form its government. City charters establish the structure and powers of local city governments that are deemed necessary to respond to its citizens' needs. Title 9 of the Arizona Revised Statutes further supplements Scottsdale's City Charter authority to define the powers and functions of Scottsdale's government within the State of Arizona.

5. Title 9 of Arizona Revised Statutes and Article 1, Section 3 of Scottsdale's Charter empower Scottsdale with a wide range of authority to make and enforce ordinances and regulations to manage its infrastructure, to protect the health, safety and welfare of its citizens and to preserve and enhance the environment, livability and aesthetic quality of the City.

6. Title 9 of the Arizona Revised Statutes is published on the State's website located at https://www.azleg.gov/arsDetail/?title=9.

7. Scottsdale's Charter is published on Scottsdale's website located at https://www.scottsdaleaz.gov/council/charter.

8. Scottsdale's ability to protect the health, safety and welfare of its citizens and to preserve and enhance the livability, aesthetic and environmental quality of the City within its Charter authority and police powers are some of Scottsdale's most valuable, but intangible, proprietary interests. Scottsdale's powers are used not only to protect the quality of life in Scottsdale, keeping property values high so that sufficient property tax is available to sustain the City, but it also serves to make the City an international travel destination. Scottsdale's tourism industry serves to generate additional tax income necessary to sustain the cost of City services and amenities that are provided to citizens and visitors alike.

9. Historically, the City has passed a number of ordinances directed toward livability, aesthetics and environmental quality. For example, Scottsdale

has adopted an "Environmentally Sensitive Lands Ordinance" ("ESLO") that applies to a significant portion of the City including areas affected by aircraft noise. (Scottsdale Revised Code ("SRC"), Appendix B, Basic Zoning Ordinance, Article VI.) Among the many purposes of ESLO include to "[p]rotect and preserve significant natural and visual resources" and "[r]ecognize and conserve the economic, educational, recreational, historic, archaeological, and other cultural assets of the environment that provide amenities and services for residents and visitors." (SRC, Appendix B, § 6.1011.) Properties within the ESLO are required to provide a dedication of Natural Area Open Space to preserve these sensitive environmental conditions. (SRC, Appendix B, § 6.1060.)

10. In addition to ESLO, the City also imposes noise abatement and standards on various districts in the affected area. (SRC § 5-358; Appendix B, § 5.2808.) The City also has a general ordinance limiting noise creation by business establishments and vendors. (SRC §§ 16-637 & 19-28.)

11. Unfortunately, the Federal Aviation Administration's implementation of flight procedures for Phoenix Sky Harbor resulted in significantly and disproportionately more aircraft flying over residential and business areas in Scottsdale neighborhoods, many of which are part of the environmentally sensitive and Natural Area Open Space lands.

12. The FAA's implementation of the flight procedures at issue and its Final Order issued on January 10, 2020 ("Decision") not to take any further action to provide relief to Scottsdale from increased aircraft noise and pollution has adversely impacted and will continue to adversely impact Scottsdale's proprietary interest in protecting the health, safety and welfare of its citizens from the aircraft noise and air pollution. It has further adversely impacted Scottsdale's ability to preserve and enhance the livability, aesthetic and the environmental quality of the City.

13. Additionally, the FAA's implementation of the flight procedures at issue here and its Decision has harmed Scottsdale's real property interest in several City properties and facilities that Scottsdale either owns or has a real property interest in, which would include McDowell Mountain Ranch Park, Scottsdale McDowell Sonoran Preserve, and the park land Scottsdale is currently developing into a neighborhood park in DC Ranch, just by way of only a few examples.

14. Parks and Natural Area Open Space are at the core of Scottsdale's charm and identity, and these amenities have come at a great cost to Scottsdale and its citizens. Quiet enjoyment is a fundamental attribute to Scottsdale's park lands and open space. The FAA's flight procedures have placed overflights in the direct path of Scottsdale's parks, open space, libraries and other amenities. This has caused the enjoyability of these properties to decline as a result of a substantial

increase in noise and air pollution, which hinders the very purpose of these amenities.

15. Additionally, Scottsdale also owns facilities such as Westworld, which is a City event center that includes outdoor venues for equestrian and other uses. In these places, not only has the aviation noise been detrimental to the purpose of various cultural and equestrian events where quiet can be an essential element to enjoying the music and other sound effects, but the characteristics of these places have also been altered by the noise and fumes emanating from the constant overflights.

16. Scottsdale has invested substantial resources in acquiring and maintaining the aesthetic and inherent historic character of these public amenities and its open spaces. Scottsdale has a concrete interest in protecting the aesthetic, natural and inherent character of these places.

17. The FAA's implementation of flight procedures and its Decision have harmed Scottsdale's real property interests. It has adversely impacted Scottsdale's proprietary interests to protect and enhance the aesthetic and environmental quality of its own property and the property of its (property-tax-paying) citizens.

I declare under penalty of perjury under the laws of United States that the foregoing is true and correct.

Executed this 26th day of April, 2021 in Scottsdale, Arizona.

Sherry R. Scott
Scottsdale City Attorney

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on February 24, 2022. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: February 24, 2022 LEECH TISHMAN FUSCALDO & LAMPL

By: Steven M. Taber

Steven M. Taber
Attorneys for City of Scottsdale, Arizona